United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7145

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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THE GUARDIANS ASSOCIATION, etc., et al.,

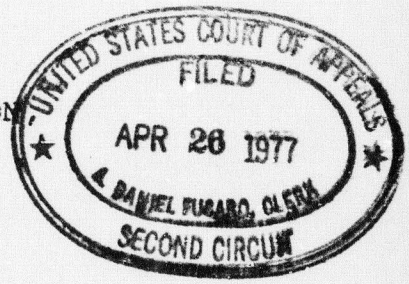
Plaintiffs-Appellees,

v.

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York



BRIEF FOR
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AMICUS CURIAE

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency entrusted by Congress with administration and enforcement of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (1970, Supp. V). The present appeal involves interpretations of Title VII which may seriously affect the statute's administration and

enforcement. The Commission therefore believes it to be in the public interest that it present its views to this Court.

ISSUES PRESENTED*

1. Whether a public employer violates Title VII or 42 U.S.C. 1981 (1970) when the employer fails to give credit for seniority lost as a result of discriminatory practices which occurred prior to the time Title VII was made applicable to public employers.

2. Whether a claim is timely under Title VII when filed with the EEOC within 300 days of a layoff conducted in accordance with a seniority list which fails to give credit for seniority lost through discriminatory practices which occurred more than 300 days before the claim was filed.

3. Whether proof of an invidiously discriminatory purpose is necessary to establish a violation of Title VII if the defendant is a public employer.

STATEMENT*

This suit was brought under Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.; Section 1, Civil Rights Act of 1866, 42 U.S.C. 1981; the Civil Rights Act of 1871, 42 U.S.C. 1983; other statutes; and the

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*/ This brief does not address evidentiary issues involved in this appeal.

Fourteenth Amendment. The plaintiffs are organizations and individuals representing a class of black and Hispanic police officers laid off by the New York City police department in June 1975. The defendants are the police department, other city agencies, the police commissioner, and three members of the City's civil service commission.

After a hearing on a preliminary injunction, the district court found that the City had violated Title VII by basing layoffs on a seniority list which incorporated earlier discrimination directed against the plaintiff class. The court determined that, although all of the class members had ultimately become police officers, they had previously been excluded from the police department because of their scores on the department's entrance examinations. The court found that those examinations, all of which had been administered to members of the class prior to 1973, disproportionately excluded black and Hispanic applicants. The court found that the police department had not shown the examinations to be predictive of success as a police officer or of success during training. In addition, the court found that some members of the class had been excluded from the police department by a 5'7" minimum height requirement which the department had abandoned in March, 1973, and which

the department had not shown to have a "manifest relationship" to the duties of a police officer.

The district court found that neither the entrance examinations nor the height requirement had been adopted with an invidiously discriminatory purpose. Relying on Washington v. Davis, 426 U.S. 229 (1976), the court held that, in the absence of a showing of discriminatory purpose, neither the entrance examinations nor the height requirement violated the Fourteenth Amendment, §1981, or §1983.

The court concluded, however, that the 1975 layoffs violated Title VII because no credit had been given for the period during which officers had been excluded from the department as a result of their test scores and height. The court found that, inasmuch as neither the entrance examination nor the height requirement met Title VII standards, failure to give seniority credit perpetuated earlier discrimination. Such perpetuation of past discrimination, the court held, is itself a violation of Title VII.

Having found a Title VII violation, the district court ordered relief. The court ordered the department to give officers in the class a seniority date based on "the median date of appointment as determined by the

median score of the earliest examination which the class member took." In addition, for officers previously excluded solely by the height requirement, the court ordered the department to give the seniority date the officer would have had based either on the date he would have been hired according to his examination score or on "the median date of appointment based on the median score of the earliest examination the officer could have taken but for the height requirement." The court preliminarily enjoined all recalls which did not reflect the reordering of the department's seniority list necessitated by these adjustments in seniority dates. This Court stayed the injunction pending appeal.

ARGUMENT

I. Layoffs Based on a Seniority List which Presently Penalizes Individuals Because They Were Previously the Victims of Invidious Discrimination Violates Title VII.

This Court has consistently held that "practices which 'perpetuate' past discrimination violate [Title VII]." Equal Employment Opportunity Commission v. Local 14, Union of Operating Engineers, ___F.2d___, (2d Cir. No. 76-6150, March 21, 1977, (slip op. at 4); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); United

States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). This holding necessarily follows from Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), where the Chief Justice, writing for a unanimous Court, stated:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.

The doctrine that present practices which perpetuate past discrimination are themselves unlawful has also been accepted by every other appellate court faced with the issue. 1/

1/ For employer practices, see United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 587 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); Local 189, United Papermakers v. U.S., 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Rogers v. International Paper Co., 510 F.2d 1340, 1346-1347 (8th Cir. 1975), vacated, 423 U.S. 809 (1975), reinstated in relevant part, 526 F.2d 722 (8th Cir. 1975); Jones v. Lee Way Motor Freight Co., 431 F.2d 245, 248 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Quarles v. Philip Morris Co., 279 F.Supp. 505, 518 (E.D.Va. 1968). For union practices, see Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1054-1055 (5th Cir. 1969); United States v. IBEW Local 38, 428 F.2d 144, 150 (6th Cir. 1970); United States v. Operating Engineers, Local 520, 476 F.2d 1201, 1204 (7th Cir. 1973); United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123, 129-132 (8th Cir. 1969); United States v. Ironworkers, Local 86, 315 F.Supp. 1202 (W.D. Wash., 1970), aff'd, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).

Perpetuation of past discrimination typically involves a seniority system. Placement within the system is ordinarily determined either by the date of hire or by the unit to which the employee is assigned. If the date of hire is delayed by a discriminatory hiring practice, or the assignment determined by a discriminatory assignment practice, failure to adjust the system to take into account the seniority lost as a result of the discrimination constitutes a present violation of Title VII. Thus, if an employee has been refused employment or been relegated to a less desirable position because of an inability to pass a discriminatory test, this Court has held that Title VII requires the employee to be given the seniority which would have been his but for the results of the discriminatory examination:

> If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination he may, in some instances, be entitled to preferential treatment not because he is Black, but because, and only to the extent that, he has been discriminated against. The "freedom now" and "rightful place" doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination.

Chance v. Board of Examiners, 534 F.2d 993, 999 (2d Cir. 1976), petition for cert. filed, No. 76-344, Sept. 7, 1976. [2/] Accord: Acha v. Beame, supra, 531 F.2d at 652-656; U.S. v. Bethlehem Steel Corp., supra, 446 F.2d at 661-665.

Failure to award constructive seniority is a violation of Title VII irrespective of whether the underlying discrimination which the seniority system perpetuates was unlawful at the time it occurred. In the Bethlehem Steel case, the Court found the use of a seniority list unlawful even though "Bethlehem's seniority list rankings resulted from pre-1965 discrimination that was lawful, however reprehensible it may have been." Acha v. Beame, supra, 531 F.2d at 652. Similarly, in Acha, a suit involving layoffs from the New York police department, this Court held that failure to award constructive seniority to women who had previously been discriminatorily refused employment was unlawful under Title VII, whether or not the discriminatory refusal was itself unlawful. This

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2/ Chance was brought under §1981 and §1983, not Title VII. Its reasoning and holding, however, depend on Title VII concepts and is based on Title VII precedent.

Court expressly held that the "illegality of defendants' hiring policies prior to Title VII" was irrelevant to the Court's holding. Id. at 656 n. 15.

In the present appeal, the police department asserts that this Court's clear and ample precedent is no longer controlling. The department argues that its pre-1972 discrimination was lawful and, consequently, cannot constitute a basis for awarding constructive seniority. It claims that the Supreme Court in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), without expressly saying so, overruled the decisional law on which Bethlehem Steel, Acha and Chance, were based. In doing so, the department neglects to mention that denial of rehearing in Acha occurred after Franks, and that the Court amended Chance in the light of Franks to reiterate the propriety of constructive seniority.

At least one post-Franks appellate decision assumes that the Bethlehem Steel line of precedent is still good law. In Nance v. Union Carbide Corp., 540 F.2d 718, 728-29 (4th Cir. 1976), the plaintiff had been laid off frequently before 1965 because of her employer's refusal to allow females to transfer to avoid layoff. Although the employer had abandoned its discriminatory transfer policies prior to the effective

date of Title VII, the court of appeals held that the employer's failure to credit the plaintiff with seniority lost as a result of the pre-Act discrimination currently violated Title VII.

There are two major reasons why, after Franks, the withholding of constructive seniority from the members of the plaintiff class for discriminatory acts occurring prior to 1972 remains unlawful under Title VII. One is that, in fact, Franks nowhere reverses the precedent on which Bethlehem Steel, Acha, and Chance were based. The other is that the pre-1973 examinations and height requirement were unlawful under §1981, so that even were the City's interpretation of Franks correct, the layoffs here perpetuated past unlawful discrimination.

1. Franks. Unlike this suit--or Acha and Bethlehem Steel--Franks did not involve perpetuation of past discrimination. The issue before the Court in Franks involved the remedial power of a trial court to order constructive seniority upon a finding, in a hiring discrimination suit, that the plaintiffs had been unlawfully refused employment. The employer in Franks had excluded blacks from employment as over-the-road drivers.

The district court enjoined further exclusion but declined to order constructive seniority for victims of the past discrimination. Relying on precedent--including Bethlehem Steel--the court of appeals reversed in part. It held that black employees who had been discriminatorily assigned to non-driving jobs, including those hired prior to July, 1965 (when Title VII took effect) be allowed to use their company seniority for bidding and, if successful, for all purposes. Franks v. Bowman Transportation Co., 495 F.2d 398, 417 (5th Cir. 1974). Relying on dictum in Local 189, United Papermakers v. U.S., 416 F.2d 980, (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970), however, the court of appeals affirmed the refusal to award constructive seniority to black applicants who had applied for road driver positions after 1965 but who had been discriminatorily denied employment.

On plaintiff's petition, the Supreme Court reversed. The Court held that, not only were there no restrictions on a court's power to award constructive seniority, failure to order such relief after a finding

of discrimination was reversible error:

> Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applied for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these, his inferiors.

424 U.S. 767-68; footnote omitted.

The Court expressly noted that the "Reports of both Houses cite with approval decisions of the lower courts which granted forms of retroactive rightful place seniority relief." Id. at 765 n. 21. Among the decisions to which the Court and the congressional reports referred were the two cases which the police department asserts Franks overruled: Local 189, United Papermakers v. U.S., supra, 416 F.2d at 980, and Quarles v. Philip Morris Co., 279 F.Supp. 505 (E.D. Va. 1968). Both had held that practices which perpetuate pre-Act discrimination are themselves unlawful: "it is. . . apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." Id., 279 F.Supp.

at 518. Franks does not purport to overrule these cases; on the contrary, it expressly notes that in 1972 Congress embraced them. 424 U.S. at 765 n. 21 (citing Section by Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972--Conference Report, 118 Cong. Rec. 7166 (1972)).

The Court in Franks did indicate that Section 703(h) of Title VII, [3/] 42 U.S.C. §2000e-2(h), protected established seniority rights against some--but not all--claims based on pre-Act discrimination. The Court said:

> . . . the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

3/ §703(h) reads in relevant part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

424 U.S. at 761; citation omitted; emphasis supplied. We submit that the Court intended to distinguish between valid claims made by individuals who could show that they themselves were the victims of pre-Act discrimination--and thus entitled to rightful place seniority relief--and claims made by individuals who could not show that they personally had been victimized by pre-Act discrimination, but who were nevertheless claiming the right to override seniority because the defendant had previously discriminated against a class to which they belonged. No other conclusion is consistent with the 1972 legislative history--noted in Franks--which expressly endorsed Papermakers and Quarles. That conclusion is also consistent with the established law of this Circuit that where, as here, actual victims of pre-Act discrimination who are being denied their rightful place in the seniority system are before the court, §703(h) does not prevent the finding of a present violation of Title VII. Indeed, as this Court said in Acha:

> Until the past discrimination against those particular plaintiffs is remedied. . . the system cannot be considered "bona fide" and in fact represents a continuation of past intentionally 4/ discriminatory practices, and thus falls outside the terms of section 703(h).

4/ In Title VII actions, "intent" is present if the employer meant to do what he did; neither malice nor conscious discriminatory purpose need be shown. Local 189, United Papermakers v. U.S., supra, 416 F.2d at 996.

Cf. Watkins v. United Steel Workers, Local 2369, 516 F.2d 41 (5th Cir. 1975). In the absence of express language in Franks overruling the Local 189, United Papermakers and Quarles line of decisions, Bethlehem Steel and Acha remain controlling precedent.

2. 42 U.S.C. 1981 and the lawfulness of the police department's pre-1972 examinations and height requirement. The police department argument challenging the continuing vitality of Bethlehem Steel, Acha, and Chance is predicated on the assumption that this case involves the perpetuation of discrimination which was lawful at the time it occurred. That assumption is false. Insofar as the entrance examinations and height requirement would have been unlawful under Title VII, had Title VII been applicable to the city prior to 1972, they were unlawful under §1981. 5/

5/ Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalitites, taxes, licenses, and exactions of every kind, and to no other.

Relying on its reading of Washington v. Davis, supra, 426 U.S. at 229, the court below concluded that the examinations were neither unconstitutional nor unlawful under §1981 or §1983. The court assumed that a violation of §1981, like violations of §1983 and the Fifth and Fourteenth Amendments, depends on a finding of discriminatory purpose. That assumption is incorrect. Washington v. Davis does not compel the conclusion that only purposeful discrimination violates §1981; on the contrary, the statute, the congressional intent promoting its adoption, and decisional law construing it, compel a contrary conclusion.

Although the complaint in Washington v. Davis had included §1981 the Court declined to discuss §1981, presumably because Davis was a suit against District of Columbia officials immune from §1981 suit by virtue of the Court's holding, five days earlier, in Brown v. GSA, 425 U.S. 820 (1976), that §1981 did not apply to federal employment. In addition, because the plaintiffs in Davis had been awarded summary judgment on constitutional grounds in the court of appeals, the major thrust of Davis was to enunciate standards for determining the constitutionality of public conduct discriminating on the basis of race. See 426 U.S. at 237, 238. The Court held that official conduct is not unconstitutional

under either the Fifth Amendment's Due Process clause or the Fourteenth Amendment's Equal Protection clause "solely because it has a racially disproportionate impact." 426 U.S. at 239. Section 1981, unlike §1983, was enacted pursuant to neither of these constitutional provisions; its interpretation, therefore, does not hinge on the scope or meaning of either.

As the Supreme Court explained three weeks after Davis, §1981 is derived from §1 of the Civil Rights Act of 1866, [6/] Runyon v. McCrary, 427 U.S. 160, 168 n. 8, 169 (1976), and is based on "'Congress power under §2 of the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery . . . .'" Id.; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). The purpose of the statute according to its author, Senator Trumbull, was to "break down all discrimination between black men and white men." Cong. Globe, 39th Cong., 1st Sess., 599 (1866), quoted id., 397 U.S.

6/ Section 1981 is also derived from the Civil Rights Act of 1870. For the history of the 1870 amendment and its significance, see Guerra v. Manchester Terminal Corp., 350 F.Supp. 529, 533-36 (S.D. Tex. 1971), adopted in relevant part, 498 F.2d 641, 653-54 (5th Cir. 1974).

at 432; emphasis by the Court. 7/

Because §1981 is based on Congress' power to legislate under the Thirteenth Amendment, it has been applied both to private employers, Johnson v. Railway Express Agency, 421 U.S. 454 (1975), who are unaffected by the Fourteenth Amendment, and to municipal corporations immune from suit under §1983. Sethy v. Alameda County Water District, 545 F.2d 1157, 1160-61 (9th Cir. 1976) (en banc)(a post-Davis decision). Because neither the Thirteenth Amendment nor §1981 makes a distinction between private and state action, the elements of a

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7/ Section 1981 was primarily intended to benefit blacks but is available to members of all races. McDonald v. Santa Fe Trails Transportation Co., 427 U.S. 273 (1976). While §1981 is directed to racial discrimination, it does not speak of race but uses the term "white citizens." Thus, it is not dependent on ethnological definitions of race but reflects popular conceptions (or misconceptions). See United States v. Thind, 261 U.S. 204, 208 (1923). Because in this country Hispanic people--primarily Mexican-Americans and Puerto Ricans--are the victims of discrimination because they are regarded as "non-white," Hernandez v. Texas, 347 U.S. 475, 479-80 (1954); Ranjel v. City of Lansing, 293 F.Supp. 301, 308 (W.D. Mich. 1969) rev'd on other grounds, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970), §1981 has properly been held to protect them. Miranda v. Clothing Workers, Local 208, ___ F.Supp. ___, 10 FEP Cases 557 (D.N.J. 1974); Puerto Rican Media Action v. Metromedia, ___ F.Supp. ___, 10 FEP Cases 1009, 9 EPD ¶10,173 (S.D.N.Y. 1975); cf. Budinsky v. Corning Glass Works, ___ F.Supp. ___, 14 FEP Cases 504, 506 (W.D. Pa. 1977).

§1981 violation are the same, irrespective of the identity of the alleged discriminator. See United States v. City of Chicago, 549 F.2d 415, 425, 430-32 (7th Cir. 1977), a post Davis decision finding a 1971 Chicago police department entrance examination unlawful under §1981; Davis v. County of Los Angeles, ___F.2d___, 13 FEP Cases 1217, 1220, 12 EPD ¶11,219 (9th Cir. 1976), a post-Davis decision holding a 1969 fire department entrance examination unlawful under §1981.

In general, in determining whether §1981 has been violated, courts have applied Title VII criteria. Chance v. Board of Examiners, supra, 534 F.2d at 998; United States v. City of Chicago, supra, 549 F.2d at 415. A Title VII violation is determined by "the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., supra, 401 U.S. at 432. It would be wholly incongruous to demand greater proof of intent for finding a violation of §1981, a statute which, in "sweeping terms," is designed to "eliminate the badges and incidents of slavery," whatever their source. Since the "badges and incidents" of slavery are objective, verifiable, barriers to full equality, there is as little room under §1981 as under Title VII for requiring proof of the discriminator's subjective intent. No reported decision requires such proof.

If then, as the district court found, the entrance examinations and height requirements at issue in this case have had a racially discriminatory impact and the police department has failed to demonstrate their "manifest relation" to employment discrimination, they are as violative of §1981 as they would have been of Title VII. United States v. City of Chicago, 549 F.2d at 424 ff.; see, Griggs v. Duke Power Co., supra, 401 U.S. at 434; Albemarle Paper Co. v. Moody 422 U.S. 405 (1975). The denial here of constructive seniority, therefore, perpetuates discrimination which was unlawful when it occurred. Nowhere in Franks, in §703(h), or in the 1964 and 1972 legislative history, is there any suggestion that Congress intended to permit practices which were illegal before the enactment of Title VII to continue to contaminate employment relationships after enactment. The perpetuation of practices which were unlawful when they occurred is, therefore, itself unlawful.

II. This Suit is Barred Neither by Limitations nor Laches.

1. Limitations. The Title VII charges here were all filed within 300 days of the layoff. They are timely. See §706(e), 42 U.S.C. 2000e-5(e), which requires filing within either 180 or 300 days of the practice being challenged, depending on the state or locality

in which the practice occurs.[8] The police department, however, argues that charges in cases involving the perpetuation of past discrimination are timely only if filed within 180 or 300 days of the underlying discriminatory practice. The argument was unsuccessfully made by the police department in its petition for rehearing and suggestion for rehearing en banc in Acha v. Beame, supra, No. 75-7388, and to the district court on remand. Acha v. Beame, ___F.Supp.___, 13 FEP Cases 16, 12 EPD ¶11,113 (S.D.N.Y. 1976). In a slightly different form, the issue is before another Panel[9] of this Court in Cates v. Trans World Airlines, Inc., No. 76-7420, docketed Aug. 30, 1976, argued Mar. 3, 1976.

8/ Section 706(e) reads:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . .

9/ Judge Lumbard, Oakes, and Bryan.

Acha involved the same layoff which gives rise to this suit. There, women who had previously been excluded by the police department's discriminatory hiring practices asserted that they would not have been laid off had the department given them their rightful seniority. This Court said:

> Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered "bona fide" and in fact represents a continuation of past intentionally discriminatory practices. . . .

531 F.2d at 655. Implicit in the Court's holding in Acha is the prevailing view the seniority system discriminates anew each time it operates to penalize an individual because he is the victim of past discrimination. Cf. Franks v. Bowman Transportation Co., supra, 424 U.S. at 767-68. In short, each subsequent employment decision which is determined by, and gives effect, to the results of a previous discriminatory decision itself constitutes a new act of discrimination. Marquez v. Omaha District Sales Office, 440 F.2d 1157, 1162 (8th Cir. 1971); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 890, n. 1 (5th Cir. 1970). In the case of a seniority system which perpetuates prior discrimination, an individual may therefore challenge the operation of that system as long as he is subject

to it, provided that the individual can prove that it preserves past discrimination against him. That proposition is implicit not only in Acha, but also in this Court's decision in Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). Williamson involved the same seniority system at issue in Bethlehem Steel. It was brought by black employees on layoff challenging their placement on the recall list resulting from discriminatory assignments occurring years earlier. This Court permitted the challenge because the seniority list incorporated the earlier discrimination.

The proposition which is only implicit in Acha and in Williamson, is explicit in Williams v. Norfolk and Western Ry. Co., 530 F.2d 539, 541-42 (4th Cir. 1975). There, the court of appeals found a current violation because the seniority system perpetuated discrimination based on events occurring in 1960. In Williams, whites had been given seniority credit for service with a merged railroad while blacks had not. When two black employees sued in 1973 to be permitted to use their full seniority for bidding purposes, the defendant--as here--argued that the suit was

untimely. The court rejected the defense, saying:

> The cause of action Williams and Russell assert is not based on their loss of seniority with respect to the black barney yard in 1960. Instead, they complain that their exclusion from the CT yard because of their race deprived them of the benefits of their Virginian seniority, while white brakemen from the Virginian were allowed to transfer their seniority. The relief they seek is parity with their white counterparts from the Virginian.
>
> [The railroad's] unlawful employment practices extended beyond the critical dates for filing charges and instituting this action under §1981 and Title VII. Williams and Russell challenge this continuous discrimination rather than any single discriminatory act. Consequently, neither the two-year statute of limitations applicable to §1981 nor the 180-day limitation of Title VII bars this action. Macklin v. Spector Freight Systems, Inc., 156 U.S. App. D.C. 69, 478 F.2d 979, 994 (1973). [Other citations omitted].

Id. at 542. See also, Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1970), rev'd on other grounds, 401 U.S. 424 (1971).

Of course, if the plaintiff in a Title VII action has not been subject to the seniority system within 300 days of filing the charge, the Title VII claim is untimely. See Collins v. United Air Lines, Inc., 514 F.2d 594, 596 (9th Cir. 1975) (plaintiff untimely because not subject to seniority system inasmuch as she had not established her right to be hired); Terry v. Bridgeport Brass Co., 519 F.2d 806, 808 (7th Cir. 1975)

(plaintiffs no longer subject to seniority system since they had knowingly waived rights to recall). But see Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976), cert. granted, 45 U.S.L.W. 3329 (Nov. 1, 1976)(charge filed after reemployment, but years after discharge, is timely because rehiring again subjects former employee to seniority system).

In the present case, the plaintiff class consists of persons all of whom were employed as police officers and subject to the department's seniority list at the time of layoff. Since the layoff was a fresh perpetuation of the department's earlier discriminatorily unlawful hiring practices, charges filed within §706(e)'s time limits, calculated from the date of layoff, meet Title VII's statute of limitations.

2. Laches. We agree with the police department that, in appropriate cases, laches will bar a private Title VII suit.[10/] Franks v. Bowman Transportation Co., supra, 495 F.2d at 406. Laches, however, is an affirmative defense which must be

10/ A detailed analysis of when laches might apply appears in the Commission's brief amicus curiae in Cates v. Trans World Airlines, No. 76-7420, at 20-27.

both pleaded and proved to the satisfaction of the trial court.

One of the elements of laches is that delay has resulted in actual prejudice. Cf. Albemarle Paper Co. v. Moody, supra, 422 U.S. at 423-24. The police department does not here claim to be prejudiced by the delay. (Brief at 40). It does assert, however, that some police officers would be "bumped" as a result of this litigation. Id. This is a misreading of the relief sought by the plaintiffs and ordered by the trial court. As in Acha, the result of the preliminary injunction here is to revise the order of recall so that all officers on layoff will be recalled on the basis of their rightful place seniority. No present incumbent will be displaced from his or her job. Nor, apparently, could they be. See U.S. v. Bethlehem Steel Corp., supra, 446 F.2d at 663-64. Thus, the claimed prejudice is a phantom, unrelated to the realities of this suit.

The district court found no grounds for the application of laches. In the absence of a showing of actual prejudice, the court did not abuse its discretion.

III. Congress' Application of Griggs Standards to Public Employers is Constitutional. --

In defense of its entrance examinations and height requirements, the City argues that Congress had no power under the Fourteenth Amendment to enact legislation applying higher standards to public employers than those to which public employers would have been subject by the Fourteenth Amendment alone. This issue is under submission to the Supreme Court in Hazelwood School District v. U.S., cert. granted, 45 U.S.L.W. 3454, Jan. 11, 1977. In addition, our discussion of §1981 and the Thirteenth Amendment makes analysis of the unlawfulness of the examinations and height requirement under Title VII irrelevant to a finding that the withholding of constructive seniority here was unlawful.

As Davis itself suggests, however, interpretation of the Fourteenth Amendment, absent legislative guidance, may be very different from judicial interpretation when Congress has acted. Thus, in Davis the Court discussed both constitutional standards and the more stringent statutory standards involved in that case, intimating that the standards could be quite different.

In any event, the application of Title VII to prohibit discrimination by a public employer is a proper exercise of congressional power. In enacting the 1972 amendments applying Title VII to states and local government, Congress exercised its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. The legislative history reflects a determination that "[l]egislation to implement this aspect of the Fourteenth Amendment was long overdue." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., at 18-19 (1971). Remedial legislation of this kind, although it may intrude into "spheres of autonomy previously reserved to the States," has been consistently sanctioned as an appropriate exercise of Congress' power under the post-Civil War amendments. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Title VII can also be independently sustained under the commerce power because its implementation of the Fourteenth Amendment commands does not interfere with any attribute of state sovereignty constitutionally insulated from the congressional exercise of the commerce power. See Usery v. Allegheny County Institution

District, 544 F.2d 148, 154-55 (3d Cir. 1976), cert. denied, 45 U.S.L.W. 3651 (Mar. 28, 1977). The mandate not to discriminate on the basis of race does not interfere with the discretion of state and local governments in determining the number of employees hired, their functions, or hours and wages. Cf. National League of Cities v. Usery, 426 U.S. 833 (1976).

The legislative history of the 1972 amendments contains numerous discussions approving the Griggs v. Duke Power Co., supra, 401 U.S. at 424, rationale (see, e.g., S. Rep. No. 92-415, 92d Cong., 1st Sess., at 5, 14 (1971)), as well as the explicit statement that employees of State and local government were to be afforded "the same benefits and protections in equal employment as the employees in the private sector of the economy." Id. at 9; cf. Chandler v. Roudebush, 425 U.S. 840 (1976). Congressional power to adopt such prophylactic measures under Section 5 of the Fourteenth Amendment is supported by analogy to the congressional prohibitions of literacy tests upheld in South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966), and Oregon v. Mitchell, 400 U.S. 112, 118

(1970), notwithstanding the Court's prior holding in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), that the use of literacy tests as a qualification for voting is not per se unconstitutional. As the Court repeatedly has recognized, the post-Civil War amendments constituted "enlargements of the powers of Congress." Ex parte Virginia, 100 U.S. 339, 345 (1879), quoted in Fitzpatrick v. Bitzer, supra, 427 U.S. at 454.

It is for Congress to decide what legislation is necessary and proper in the exercise of its powers under either the Commerce Clause or Section 5 of the Fourteenth Amendment, and its choice of appropriate means for exercising those powers--so long as those means are not elsewhere prohibited by the Constitution--should be upheld. M'Cullogh v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

CONCLUSIONS

For the reasons stated, the district court's judgment should be affirmed.

Respectfully submitted,

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